STATE OF MICHIGAN

COURT OF APPEALS

HURON INTERMEDIATE SCHOOL DISTRICT, and HURON INTERMEDIATE BOARD OF EDUCATION, Plaintiffs-Appellees,	UNPUBLISHED June 15, 2006
v	No. 257580 Huron Circuit Court
HURON INTERMEDIATE EDUCATION ASSOCIATION, Defendant-Appellant.	LC No. 04-002473-CL

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

In this dispute over the firing of Dolores Coleman, a teacher whose teaching certification had expired, defendant Huron Intermediate Education Association (the union) appeals as of right from an order granting summary disposition to plaintiffs Huron Intermediate School District and Huron Intermediate Board of Education (collectively, the school system) on the ground that the case should not have been submitted to arbitration. We affirm.

I. Basic Facts And Procedural History

Coleman, a teacher at the Huron Area Technical Center, allowed her provisional teaching certificate and temporary authorization to teach vocational programs to lapse by failing to complete the attendant education requirements. After learning that she would not otherwise be able to continue teaching, Coleman asked the school system to seek a waiver of the certification requirements on her behalf. The school system refused and dismissed Coleman because she was no longer certified.

The union filed a grievance, which Coleman's principal and district respectively denied. The union then referred the dispute to arbitration under a collective bargaining agreement and, over the school system's objections, the case was referred to a private arbitrator. The arbitrator issued an award concluding that the dispute was subject to arbitration and ordering the school system to cooperate with the union and Coleman "in applying for a renewal of her provision certificate and vocational authorization certificate."

The school system then sued and asked the trial court to declare that the arbitrator exceeded his authority because the dispute was not subject to arbitration, to vacate the award,

and to enjoin the union from seeking further arbitration in the dispute. The school system's central argument was that once Coleman's certificates expired, she was no longer a "teacher" or "certificated" under the Teacher's Tenure Act.[1] The school system also alleged that Coleman lost her tenured status at the same time. Hence, alleged the school system, Coleman was not a member of the union because its bargaining agreement with the school system defined it as "a unit consisting of all certified personnel or other professional personnel as approved by the State Board of Education." Therefore, argued the school system, the arbitration process could not be invoked. The union answered, denying that the dispute was not subject to arbitration and that the award should be vacated.

The school system moved for summary disposition under MCR 2.116(C)(10). The trial court heard argument on the motion and announced its conclusion from the bench:

> [I]n my opinion the underlying issue here is whether or not she [Coleman] was a member of the unit at the time of the termination. I think clearly looking at the . . . the collective bargaining agreement standing alone, she was not. A teacher is defined as someone who is certified, tenured, and she was neither certified nor tenured at the time she was terminated.
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> The argument is made . . . that somehow that was amended[,] at least in this case[,] by the practice of the parties. But . . . there really is no evidence of the practice of the parties allowing non-certified, non-tenured teachers to teach except . . . to try and work in this case with this individual until it was ultimately determined that it was impossible for her to obtain her certification and her tenure and for that reason terminated her.
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> The question of arbitrability is a question that the Court approaches . . . on its own without referring to the arbitrator's decision in that regard, . . . it's akin to jurisdiction, and either he had jurisdiction or he did not. And if he did not, then his . . . award cannot be supported.
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> . . . [T]he collective bargaining agreement clearly defined who members of the collective bargaining unit are, that in her case would require her to have been certified and tenured, she was not, and[,] therefore[,] she was not a member of the unit and not entitled to the benefits of the collective bargaining agreement. And[,] therefore[,]. . . the award of the arbitrator is not supported by the agreement or the law[,] and for that reason I'm going to . . . grant . . . the motion for summary disposition in . . . favor of the plaintiffs in this case.

The trial court entered an order reflecting this holding, declaring that the dispute "is not arbitrable and that [the arbitrator] thereby [exceeded] his jurisdiction as an arbitrator," vacating the award, and enjoining the union from pursuing any further arbitration in the case. This appeal ensued.

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[1] MCL 38.71 *et seq*.

II. Arbitrability

A. Standard Of Review

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition."[2]

B. The Trial Court's Logic

The trial court's logic in this matter consists of a simple, and negative, syllogism:

> *Major Premise*: Under the collective bargaining agreement between the school system and the union, the arbitration process can only be invoked for members of the union.
>
> *Minor Premise*: At the time of her dismissal, Coleman was not a member of the union because she did not fall into the categories of "certified personnel" or "other professional personnel as approved by the State Board of Education."
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> *Conclusion*: Therefore, the arbitration process could not be invoked.

The union has neither explained nor cited authority that suggests why the trial court's minor premise—that Coleman was not a member of the bargaining unit once her provisional certificates expired—was incorrect. The union thus shows no error in the trial court's finding that there was no genuine issue of material fact concerning Coleman's status under the collective bargaining agreement, or, therefore, in its conclusion that the arbitration process could not be invoked.

C. *Bd of Ed of the Benton Harbor Area Schools v Benton Harbor Ed Assoc, MEA/NEA*

The union cites *Bd of Ed of the Benton Harbor Area Schools v Benton Harbor Ed Assoc, MEA/NEA*[3] for the proposition that "the same results should enter here, i.e., this Court should reverse the decision of the circuit court and order Ms. Coleman reinstated." However, not only is *Bd of Ed of the Benton Harbor Area Schools* factually distinguishable, this Court in that case did not order that the teacher be reinstated. Rather, this Court only reinstated the arbitrator's award, which returned the teacher to paid rather than unpaid administrative leave before his teaching certification was revoked.

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[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[3] *Bd of Ed of the Benton Harbor Area Schools v Benton Harbor Ed Assoc, MEA/NEA*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2004 (Docket No. 249070).

D. Type Of Grievance

The union also makes a cursory argument that the definition of grievance in the collective bargaining agreement permits association grievances and, therefore, that the union could file an appeal on Coleman's behalf regardless of her status. However, the collective bargaining agreement defines two separate classes of grievances, those filed by a staff person and those filed by the union. Defendant's argument that the grievance at issue here is an "association grievance" contradicts the arbitrator's repeated description of Coleman as the "Grievant" in the case. Therefore, this argument is equally meritless.

Further, and in any event, the issues of whether a grievance can be filed and, if so, by whom and the issue of whether arbitration can be invoked *following* that grievance are two separate, and distinguishable, issues. It is crystal clear under the language of the collective bargaining agreement that the union had no right to invoke the arbitration process on Coleman's behalf because she was not, by definition, a member of the bargaining unit. The trial court therefore did not err in granting summary disposition to the school system.

E. Drawn From The Essence

The union argues that the arbitration award should be reinstated because it "drew its essence" from the collective bargaining agreement. We would disagree, but our conclusion that the dispute was not properly submitted to arbitration makes it unnecessary to reach this issue.

III. Response To Dissent

A. Overview

The dissent concludes that the union has "failed to establish that the arbitrator exceeded its authority in issuing this award."[4] The dissent has two separate, and indeed logically unrelated, grounds on which it bases this conclusion. The first is the generalized belief that the proceedings below revolved around whether Coleman was a "just cause" rather than an "at will" employee. Secondly, the dissent then asserts that, as a "de facto" employee of the school system, Coleman was therefore a "staff person" who was entitled to use the grievance procedure.

B. "Just Cause" Versus "At Will" Employment

The dissent cites the language of the collective bargaining agreement that provides that the union is the exclusive bargaining representative "for a unit consisting of all certified personnel or other professional personnel as approved by the State Board of Education." The dissent then states, "From this language, plaintiffs extracted the argument that Coleman's lack of certification rendered her an at-will employee with no rights under the contract, so she could not resort to the contract's provisions for resolving disputes."[5]

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[4] *Post* at 6.

[5] *Post* at 3.

There is only one problem with this assertion: it totally misses the point of the proceedings, and the results, below. The arbitrator's decision and award make it clear that, although the school system argued that there was no just-cause standard applicable to Coleman's termination and that she was basically an employee at will, the school system's basic contention was that once Coleman lacked certification she was no longer a teacher within the scope of the Michigan Teacher Tenure Act. The arbitrator went on to explain that the school system argued that:

> Similarly, Article I – Recognition – defines the bargaining unit. Once [Coleman] lost her certification, she was no longer within the defined bargaining unit of the Collective Bargaining Agreement and was not entitled to file a grievance or have the benefits of that agreement.

The arbitrator ultimately rejected this assertion, ruling that:

> If [Coleman] was teaching in the School District, she obviously was a member of the bargaining unit at the time of her termination. The grievance questions the decision to terminate [Coleman]. It clearly meets the definition of a grievance. Hence, I do find the grievance arbitrable.

It was *this* decision that the school system appealed to the trial court. Again, while the school system asserted to the trial court that because Coleman had lost her status as a tenured teacher and a member of the bargaining unit she had reverted back to an employee at will status, the basic point of its argument was that because Coleman had lost her status as a bargaining unit member she "therefore was not entitled to assert the rights and benefits of the collective bargaining agreement in order to file a grievance or have one processed for her by the union."

The record is absolutely clear that it was *this* argument with which the trial court agreed. Before making its ruling—in fact, during the union's argument—the trial court stated the issue clearly. The trial court said, "I think it boils down to whether or not she was a member of the union, that's the issue. Was she a member of the bargaining unit, was she—under the terms of the contract?" As stated in the body of this opinion, the trial court went on to determine that at the time of her dismissal, Coleman was not a member of the union because she did not fall into the categories of "certified personnel" or "other professional personnel as approved by the State Board of Education" and that, therefore, the arbitration process could not be invoked.

It is to *this* decision that the parties have directed their arguments on appeal. The union does suggest that the arbitrator found that the school system's termination of Coleman was a breach of the "just cause" language of the collective bargaining agreement. However, the union's basic argument to this Court is that courts play a very limited role in reviewing labor arbitration contracts, that the arbitrator's award drew its essence from the collective bargaining agreement, and that on the merits the trial court should not have vacated that award. Similarly, the school system does suggest that because Coleman's provisional teaching certificate and her temporary vocational authorization had expired, she was no longer in the bargaining unit and therefore had "reverted" to an employee at will. But the school system's basic argument to this Court is that at the time of her termination Coleman was no longer a member of the bargaining unit and had no rights that she could assert under the collective bargaining agreement between the school system and the union.

Thus, the question of whether Coleman was a "just cause" versus an "at will" employee was not the issue before the arbitrator, it was not the issue before the trial court, and it is not the issue before this Court. The dissent, essentially, attempts to change the issue and therefore change the subject. It is a failed attempt and a classic red herring.

C. "De Facto" Employment

Noting that the school system continued Coleman's employment for a period of time after her certifications expired, the dissent contends that this qualifies her "as a 'staff person' under the plain meaning of that phrase."[6] After noting that the school system has not offered any contractual definition of "staff person," the dissent speculates that "[t]he parties may have expressly used the phrase 'staff person,' rather than 'teacher' or 'union member,' for the protection of those teachers who find themselves in Coleman's predicament."[7] There is not a shred of evidence in the record to support this speculation and nowhere in its arguments to this Court does the union even hint at this suggestion. Indeed, although the dissent claims that the school system's argument ignores the plain meaning of the phrase "staff person," the dissent ignores the basic tenet that contracts must be read as a whole.[8] By stating that the bargaining unit consists only of certified or approved personnel it rationally follows that any "staff person," as that term is used in the arbitration clause within the bargaining agreement, would have to be certified or approved to enjoy the protection of that agreement. Thus, the dissent's conclusion that "the contract does not state that only members of the bargaining unit . . . are the only ones who may file a grievance,"[9] is logically flawed. Further, the dissent's apparent assertion that Coleman's alleged status as a non-certified staff person is virtually the same as being a certified member of the bargaining unit—despite the express words of the collective bargaining agreement defining membership in the bargaining unit—is to virtually adhere to the parties' intent.[10] However, we are required to render decisions *actually* adhering to the parties' intent.[11]

Undeterred, however, the dissent next suggests that Coleman, "in her de facto employment as an uncertified teacher"[12] might, "for that matter," be "a de facto member of the

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[6] *Post* at 4.

[7] *Id*.

[8] *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186 (contracts are to be interpreted and their legal effects determined as a whole).

[9] *Post* at 4.

[10] See *Maryland v Craig*, 497 US 836, 870; 110 S Ct 3157; 111 L Ed 2d 666 (1990) (Scalia, J. dissenting), Justice Scalia noted that to assert that placing a defendant in the next room was virtually the same as having that defendant in the courtroom was to assert that such a process was "virtually constitutional" under the Confrontation Clause.

[11] *Detroit Trust Co v Howenstein*, 273 Mich 309, 313; 262 NW 920 (1935).

[12] Despite Coleman's unfortunate personal setbacks, we find it significant that Coleman had approximately 10 months—from June 2002 to April 2003—in which to renew her certification, during which time she apparently ignored the principal's notification in November 2002 that she immediately address the problem.

bargaining unit."[13] In its footnote 2, the dissent goes further and states unequivocally, that, "Coleman, at the least, is a de facto member of the bargaining unit."[14] We again note again that this line of attack on the trial court's decision has nothing whatever to do with whether Coleman was a "just cause" or an "at will" employee. Moreover, we are entirely unfamiliar with the process by which a person can become a "de facto" member of a bargaining agreement.[15] Coleman either was an actual member of the bargaining unit entitled to file a grievance, or she was not. The dissent's attempt to create a de facto member provision in the bargaining agreement impermissibly exceeds the intended scope of the parties' agreement.[16]

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[13] *Post* at 4.

[14] The dissent suggests in the same footnote that, if our logic is correct, then "Coleman would be entitled to a return of her union dues, and the students would have to be re-educated by a certified teacher who was a member of the bargaining unit." The first suggestion is a matter between Coleman and the union. The second suggestion is, to put it gently, simply a flight of fantasy.

[15] We suspect that the union might have some problems with this interpretation as well. Under it, a non-dues paying non-union employee of the school system would be entitled to use the grievance and arbitration provisions of the collective bargaining agreement on the exact same footing as a dues-paying union member. The result would be to convert a "de facto" employee into a "de facto," but non-dues paying, union member.

[16] *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991) (courts should not rewrite contracts to include terms to which the parties have not agreed.)